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Supreme Court, U.S.
FILED

95 1541 MAR 2 1 1996

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No._____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1996
Gerard Hennessey, Pro Se,
Petitioner

versus

L.J. Blalack, DonMcBeath,
Lubbock County, J. David Nelson et al,
Respondents

On petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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68 pp

Questions Presented

Petitioner asks the Court to consider the following questions:

1. Has the Fifth Circuit Court of Appeals denied Petitioner his Seventh Amendment right to a determination of facts by jury in a civil suit, by affirming reversal of a jury verdict based on overwhelming evidence, contrary to decisions by the Seventh and Ninth Circuits and the Supreme Court, especially when the Fifth Circuit has rebuked the same lower court for reversal of another jury verdict?

2. Is the Fifth Court of Appeals in conflict with the Supreme Court's opinions in *Monell v New York Department of Social Services*, *Pembaur v Cincinnati*, and *Canton v Harris*, and the Eighth Circuit's *McGautha v Jackson* inasmuch as the trial jury found that a local government was liable for a policy and practice of actions and inactions and its chief policymaking official that were the *proximate cause* of injury to Petitioner by means of false arrest?

3. Is the Fifth Circuit Court of Appeals in conflict with itself, its sister circuits, with the United States Supreme Court, as well as the Supreme Court of Texas, by reversing a jury verdict finding of *proximate cause*, when extensive evidence of widespread public knowledge and repeated decisions not to act--as well as active interference with investigations by other officials, judges, officers of the court and members of the bar--to deal with extensive and grievous civil rights abuses, including unlawful arrest, by a justice of the peace over a period of at least seven years, render the unlawful arrest of a citizen by that justice of the peace to be an event that was *foreseeable* to any reasonable person?

4. Is the Fifth Circuit Court of Appeals in conflict with itself, with the United States Supreme Court, as well as the Supreme Court of Texas' *City of Gladewater v Pike* and the Eight Circuit's *McGautha v Jackson* by reversing a jury verdict finding of

proximate cause, given extensive evidence of *deliberate indifference and callous disregard* by a local government and its principal policymaker that were engaged in and benefitted financially from a policy and practice of ignoring and refusing to mitigate or take any steps to warn or protect citizens from grievous, longstanding and widely known civil rights abuses by a justice of the peace, along with active interference with investigations of these abuses?

5. Has the Fifth Circuit Court of Appeals abused its discretion by imposing frivolous appeal sanctions of costs and double attorney's fees against a pro se civil rights litigant acting as a *private attorney general* as provided in the Supreme Court's *Fogert v Fantasy*, when the "facts" cited by the court are directly contrary to the case record, and the complaint had been dismissed on the day the trial had originally been scheduled to begin, after discovery and taking of depositions, after denial by the trial court of an earlier motion to dismiss, and when the district court had found that Appellant's action was neither meritless nor frivolous?

6. Is the decision of the Fifth Circuit Court of Appeals in conflict with its own *Auclair v Sher* and *In re Niland*, by granting an abstract of judgment in order to impose a federal lien on a Texas homestead property in order to facilitate collection of an award of costs and attorney's fees in a civil rights case?

List of Interested Parties

J. David Nelson
Ralph Brock, Attorney for J. David Nelson
Charlotte Bingham, Attorney for Don McBeath and Lubbock County
Don McBeath
Lubbock County
Linda Ann Vega
Terry McEachern, Special Prosecutor
Ross Rayburn, Assistant Attorney General, State of Texas

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I. STATEMENT OF THE BASIS FOR PETITION FOR REHEARING

Petitioner requests permission to re-join the severed claim *Hennessey v Nelson* 5:94-CV-112C to the original civil rights complaint filed in the Northern District of Texas as 5:93-CV-078C as *Gerard Hennessey v L. J. Blalack, Don McBeath, Lubbock County, J. David Nelson et al.* for the purpose of requesting review of frivolous appeal penalties awarded by the Fifth Circuit Court of Appeals. The former case was subsequently appealed separately to the Fifth Circuit Court of Appeals as 94-10530 (certiorari denied). Petitioner's appeal of the district court's disposition of the residual case 94-10629 *Hennessey v Lubbock County and Don McBeath* was also denied by the Fifth Circuit; review by the Supreme Court for abuse of discretion and error is requested by Petitioner.

A. Dates of judgments

1. After Petitioner's Petition for Writ of Certiorari for 94-10530 was denied, Appellee J. David Nelson applied to the Fifth Circuit Court of Appeals for an award of attorney's fees and double costs as penalty against Petitioner for filing a frivolous appeal. The Fifth Circuit's order filed **December 19, 1995**, granted Appellee Nelson's motion and awarded Nelson $2,000 in attorney's fees plus double costs. On **February 15, 1996**, the Fifth Circuit granted Nelson's motion to authorize the Clerk to execute an abstract of judgment in order to enable Nelson to file a lien on Petitioner's real property in Lubbock County.

2. Denial of Petitioner's appeal to the Fifth Circuit Court of Appeals of the reversal of a jury award of $10,000 by the Northern District of Texas, Lubbock Division, was denied as to 94-10629 on **December 11, 1995.**

3. Denial of Petitioner's Petition for Rehearing of the Fifth Circuit's denial of his appeal as to 94-10629 was denied on **January 10, 1996.**

B. Statutory provisions believed to confer on the Supreme Court jurisdiction to review the judgment in question by writ of certiorari.

In *Title 28 U.S.C.A., Rule 10* of the *Rules of the Supreme Court* states that the Supreme Court will consider granting a petition for writ of certiorari to review a decision of a U.S. court of appeals for, *inter alia*, conflict with decisions of the following:

- (an)other U.S. court(s) of appeals
- a state court of last resort
- U.S. Supreme Court.

C. Constitutional provisions, statutes, ordinances, and regulations involved

1. Amendments to the Constitution of the United States:

Article IV.: The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article V. No person shall ... be deprived of life, liberty, or property, without due process of law...

Article VII: In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Article XIV: ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws...

2. Federal Statutes

42 U.S.C. §1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. Federal Regulations:

Title 28 U.S.C., *Federal Rules of Appellate Procedure*, allows individual citizens to petition the courts of the United States without representation, ie. *pro se;* it also directs all courts to treat such petitioners on an equal basis with those represented by counsel.

4. Constitution of the State of Texas

ARTICLE XVI of the Texas Constitution

§50. Homestead; protection from forced sale; mortgages, trust deeds and liens

The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead; nor may the owner or claimant of the

property claimed as homestead, if married, sell or abandon the homestead without the consent of the other spouse, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void.

4. Texas statutes

Section 21.002, Texas Government Code: Contempt of Court

(a) a court may punish for contempt.

...

(c) The punishment for contempt of a justice court is a fine of not more than $100 or confinement in the county or city jail for not more than three days, or both such a fine and confinement in jail.

...

(e) This section does not affect a court's power to confine a contemner to compel him to obey a court order.

Goranson, Ronald L. *Contempt*, Lubbock Criminal Defense Layers Association, 1994.

...

E. Defenses to Contempt
1. Original order is void.
2. Lack ofknowledge of the existence of the order allegely violated.
3. Lack of ability to comply with the contempt order.
4. Lack of evidence.
5. Lack of a written commitment order
6. Violation of the procedural mandates.

II. CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

A. Basis for federal jurisdiction in the court of first instance

Federal jurisdiction was invoked in Petitioner's original complaint filed on April 8, 1993, in the United States Court for the Northern District of Texas, Lubbock Division, as follows:

"This action is brought pursuant to 42 U.S.C. §1983 and the Fifth Amendment to the United States Constitution. Jurisdiction is founded upon 28 U.S.C. §1251 *et seq*. Plaintiffs further invoke the pendent jurisdiction of this Court to hear and decide claims arising under State law."

B. Argument amplifying reasons relied on for allowance of the writ.

1. Summary of petition.

a. Petitioner requests the Supreme Court to review the denial his appeal to the Fifth Circuit Court of Appeals regarding its judgment which affirmed reversal of a $10,000 jury award by the District Court of the Northern District of Texas of the jury's finding of fact and asserted "facts" that are contrary to the overwhelming documentary evidence and testimony accepted by the jury.

b. Petitioner requests the Supreme Court to grant him permission to re-join the complaint against Nelson with the complaint against McBeath and Lubbock County, on the grounds that the complaint arises out of the same set of circumstances, i.e. Petitioner's false arrest by L. J. Blalack for requesting access to court records that contained evidence of Nelson's violation of Federal law--for the purpose of considering whether the Fifth Circuit Court of Appeals abused its discretion by awarding

penalties against Petitioner for filing a frivolous appeal on the grounds that Nelson's "dismissal had occurred early in the pleadings, before discovery and taking of depositions"--which is in direct contradiction to the record.

c. Petitioner also requests permission of the Supreme Court to re-join his action against attorney J. David Nelson, severed from the original complaint on the day of the scheduled start of the jury trial, for the purpose of petitioning the Supreme Court to review an order by the Fifth Circuit Court of Appeals that issued an orderfor abstract of judgment so as to allow prevailing defendant J. David Nelson to file a lien against petitioner's Texas homestead property in contradiction with its own decisions, as well as those of the Texas Supreme Court, and of the United States Supreme Court.

2. Summary of the case: a pro se civil rights RICO complaint based on actions and failures to act by Lubbock County and County Judge Don McBeath as the *proximate cause* of Petitioner's false arrest when he requested access to J. David Nelson'sSuter case records in L. J. Blalack's office.

a. Factual basis of the original complaint.

This appeal arises from a civil rights RICO complaint filed in the United States District Court for the Northern District of Texas, Lubbock Division, on April 8, 1993, seeking damages against Justice of the Peace L. J. Blalack, Attorney J. David Nelson, County Judge Don McBeath, Lubbock County, and others for their role in the circumstances which led to petitioner's false arrest by Blalack on April 9, 1991, and for subsequent false sworn statements by Blalack's staff about petitioner's false arrest.

In 1989, Nelson had vigorously attempted to prevent Petitioner from gaining access to public court records (the Suter case files) after Petitioner had warned Nelson that he was in violation of the Federal Fair Debt Collection Practices Act *15*

U.S.C.A §1692. Nelson was Blalack's largest 1990 re-election campaign contributor; also in 1990, Blalack conspired with other Lubbock County officials to have his political opponent Carlos Leal Jr. arrested on trumped-up truancy and "hot check" charges. On April 9, 1991, when Petitioner went to Blalack's office to request access to the Suter case files--which contained evidence of Nelson's violation of the FDCPA that was needed for a mediation hearing with Nelson and his client Bill Suter the following week--Petitioner was berated, publicly abused, threatened and arrested by Blalack. When Petitioner sought help and advice from Lubbock County Judge Don McBeath and other Lubbock County employees, he was not provided with any assistance.

Members of the local bar and press, other Lubbock County officials and employees, and members of the public, demonstrated widespread knowledge in the county about Blalack's abuse of citizens, particularly minorities. It involved an extensive and widely publicized pattern and practice of unlawfully arresting citizens in order to extort excessive fines and fees from them, and of using the power and authority of judicial office to harrass political opponents and other persons as a favor to political colleagues and family members. The extortion of excessive fines and fees, amounting to between $100,000 and $400,000 per year in revenue for Lubbock County, is clearly seen in extracts from Blalack's truancy and traffic offense records that were admitted in evidence during the trial. Also submitted in evidence was a list of recipients of payments from the County's "hot check" fine and fee fund--which cases Blalack handled exclusively for the County--including several thousand dollars to appellee County Judge Don McBeath and Defense Counsel Sunny Ratliff and Charlotte Bingham.

b. Summary of Pleadings.

During pre-trial pleadings the complaints against all but Nelson, McBeath and Lubbock County were dismissed. In initial pleadings both Don McBeath and J. David Nelson both filed false and misleading affidavits with the court, which they later

retracted and replaced with admissions. The court also dismissed Petitioner's complaint against Melissa Martin, who was indicted, pled *nolo contendere* and was sentenced for perjury for making a false sworn sta tement about Petitioner's conduct in Blalack's court; her sentence was affirmed by the Texas Court of Criminal Appeals.

On July 15, 1993, **the district court denied J. David Nelson's Motion to Dismiss** R324. On October 26, 1993, **the district court denied L. J. Blalack's motion for Rule 11 sanctions against Petitioner**.

On May 2, 1994, after Petitioner had completed an 11-hour deposition, on the day the trial was scheduled to begin, the district court granted Nelson's motion for judgment on the pleadings.

Petitioner appealed this dismissal, particularly as it had been granted immediately before the trial and the court had denied Nelson's two previous motions for dismissal. The Fifth Circuit Court of Appeals denied Petitioner's appeal.

On August 16, 1994, the district court denied Lubbock County's Motion for Attorney's Fees and Expense of Counsel **"because the claim of Gerard Hennessey was not frivolous, unreasonable, or groundless."**

After denial of Petitioner's Petition to the U.S. Supreme Court for Writ of Certiorari, J. David Nelson applied to the Fifth Circuit Court of Appeals for award of double attorney's fees and costs against petitioner for filing a frivolous appeal. Nelson subsequently requested and on February 10, 1996 received an abstract of judgment in order to file a lien in Lubbock County against petitioner's homestead real property, where Petitioner resides.

c. Summary of proceedings.

The May 9-12, 1994, trial proceeded against Appellees McBeath and Lubbock County. The district court defined proximate cause for the jury as "that cause which, in a natural and continuous sequence, produces an event, and without which

cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that a a person using ordinary care would have foreseen that event, or some similar event, might reasonably result therefrom." In their response to the district court's instructions, reproduced in Appendix D, the jury found that actions and failure to act by appellee Lubbock County Judge Don McBeath,and Lubbock County, were the *proximate cause* of petitioner's false arrest and awarded petitioner $10,000 damages.

On June 13, 1994, the District Court reversed the jury verdict without comment. R312 On June 27, 1995, the Fifth Circuit Court of Appeals ordered the court below to provide its reasons for reversing the jury verdict. R365 On the same day the court below instructed Appellees to submit their Proposed Findings and Conclusions R366, which Appellees filed with the court below on July 14, 1994 as "Proposed Statement of Facts and Law" R367. Rule 50 (a,b) of Federal Rules of Civil Procedure requires that the same grounds must be used in any post-verdict motion *Purcell v Sequin State Bank and Trust* 999 F2d 950 (5th Cir.1993). On the same day, the court below filed a nearly verbatim copy as its Findings of Fact and Conclusions of Law with the Fifth Circuit Court of Appeals R368. Appellants were not given an opportunity to respond. The Fifth Circuit affirmed the District Court's reversal of the jury verdict, on the following grounds:

- Blalack is not a final policymaker for Lubbock County;
- Blalack was not acting pursuant to a custom or policy of Lubbock County;
- there is no support in the record for a conclusion that Petitioner's alleged constitutional deprivations were caused by or resulted from a persistent and widespread practice of county officials.

Petitioner's Petition for Rehearing was denied February 10,1996.

d. Summary of testimony and documentary evidence on which the jury based its finding of *proximate cause*.

(i). County Commissioner Alton Brazell testified under oath that the **County Commissioners Court knew and had discussed the fact that Blalack was abusing citizens in his Justice of the Peace court in Lubbock County,** and they decided to do nothing. (Tr551,558,559, 569).

(ii). Although Appellee Don McBeath had originally filed with the court a sworn statement that he knew of no abuses of civil rights by Blalack R. Vol 12, p. 19. **extensive testimony by over a dozen witnesses showed that McBeath had been fully aware of these abuses over a period of several years.**

(iii). County Commissioner Alton Brazell testified that he had been advised by County Commissioners Randall Carpenter, Eliseo Solis, other County Commissioners and citizens about Blalack's abuses. Brazell also testified he had **had "individual discussions" with other County Commissioners and County Judge Don McBeath about Blalack's abuse of citizens in his court**. Tr 561.564.

(iv). Constable Gary Newburn, Tr 152, Vincent Gonzales, Tr 66-67,71-72, and Justice of the Peace Jim Hansen Tr317-310, Lubbock Independent School District Trustee Linda deLeon Tr254, and Linda Ann Vega Tr116 also testified that **they had informed Appellee Don McBeath and other Lubbock County Officials such as the Lubbock County District Attorney and members of the Commissioners' Court, that people were being abused, arrested and held in custody without due process of law**.

(v). In the tape recording of a conversaton between Gerard Hennessey and former Lubbock County District Attorney John Young, entered into evidence during the May 9-12trial (Exhibit HH), Young stated that **Lubbock County District Attorney Travis Ware had told him that he knew about Blalack's abuses but told Young not to do anything because "Blalack is a friend of ours." During the period when John**

Young served as Lubbock County Assistant District Attorney, Appellee Don McBeath was employed as Chief Administrator by Lubbock County District Attorney Travis Ware.

(vi). Justice of the Peace and former Lubbock City Marshall Tom Head testified that he ran for election against Blalack because Blalack's longstanding pattern of abuse had outraged the voters.

(vii). Former Lubbock County Commissioner Randall Carpenter testified that **he was personally aware of Blalack's practice of overfining and arresting citizens without cause because Blalack had done these things to his son. Carpenter testified that he brought this to the attention of McBeath and members of the Commissioners' Court, and that they decided to do nothing**. Tr 184,203

(viii). Lubbock Independent School Board Trustee Linda deLeon testified that **Blalack's abuses were widely known in the Lubbock Community and that she had discussed them with Lubbock County and Lubbock Independent School District officials**. Tr254

(ix). Linda Ann Vega testified that Blalack had kept her and her family in his courtroom, and that Melissa Martin had prepared documents and **instructed the bailiff to take Vega to jail for failure to pay a $300 truancy fine on the spot**. Vega also testified that she and Petitioner gave interviews that were **widely reported in the media**, and that she and Petitioner had filed an ex Rel action in Texas District Court to have Blalack removed from office because of his longstanding civil rights abuses and other misconduct. Thus **Blalack's abuses were widely known throughout Lubbock County**. Tr 116

(x) Justice of the Peace Jim Hansen testified that at one point he received over 100 telephone calls and personal contacts in one day, all **complaining about Blalack's abuse of citizens'**

rights. This included **Lubbock County courthouse officials, courthouse staff, attorneys, and private citizens**. Tr322.

(xi) County Commissioner Alton Brazell testified that he and **Appellee County Judge Don McBeath went to the Texas Judicial Conduct Commission in Austin concerning Judge Blalack's abuse of citizens' rights.** Tr 561.

(xii). Hale County District Attorney Terry McEachern and Texas Ranger Jim Mull testified that public officials have several ways of dealing with misconduct and civil rights abuses by an elected official, including **requesting an investigation by the District Attorney's office or the Texas Rangers**. Tr213, 249

(xiii). Randall Carpenter testified that Robert Flowers, Executive Director of the Texas Judicial Conduct Commission, gave him **three methods of launching an investigation into civil rights abuses by a judge: the Commission, a grand jury, or the District Attorney's office.** Tr203

(xiv). Mark Welbourn testified that his examination and analysis of Blalack's records, summarized in his report (Exhibit A) showed that he had brought substantial revenue to the County in the form of excessive fines and fees that had been extorted from Lubbock citizens, which **provided a powerful motivation to Lubbock County Commissioners to ignore Blalack's civil rights abuses involved in extortion of these funds.** Tr265-269

(xv) Constable Gary Newburn and Justice of the Peace Jim Hansen testified that Appellee Don McBeath, at Blalack's request, **ordered the Lubbock County Computer Service to block access to Blalack's records by Justice of the Peace Jim Hansen and Constable Gary Newburn after they told him they were investigating Blalack's excessive fines, peace bonds, and other abuses.** Tr 265-269,327-328

(xvi) Vince Gonzales testified that **Blalack had a**

widely-known practice of backing up his refusals of access to court records with threat of arrest. Tr68-69

(xvii) County Commissioner Randall Carpenter testified that **Appellees Don McBeath and Lubbock County Commissioners removed or refused to place the item of Blalack's excessive fines on the Commissioners' agenda, on the grounds that too much money would have to be refunded.** Tr 203

(xviii) PetitionerGerard Hennessey, Melissa Martin, Tami Pisarski, and Jay Helton all testified that **Blalack ordered Petitioner to be prevented from leaving the courtroom, and that he subsequently be handcuffed and taken to jail. They also testified that Blalack signed a paper and then tore it up, and that Bailiff Jay Helton never received any document ordering Petitioner's arrest.** Tr 138-147, 435-454, 465-476

(xix). Petitioner Gerard Hennessey, Tami Pisarksi, and Jay Helton all testified that **Petitioner's behavior was not loud, abusive or in any way provocative**, and that in fact **he had not said anything when Blalack had him detained after having been pointed out by Melissa Martin--to whom Petitioner had made a requestfor access to the Suter case records**. Tr 138-147, 435-454, 465-476

(xx) Attorney Sam Ogan testified that when he met with Blalack the day following Petitioner's false arrest, Blalack told him it was all a misunderstanding and that he had fixed it.Tr 85-98.

(xxi) Petitioner testified that he and Justice of the Peace Tom Head inspected Blalack's records for April 1991, that they found a complete set of serially numbered dockets, and that **none of the dockets for the month of April 1991contained any reference to Petitioner's arrest--as is required for any contempt arrest to be conform to Texas due process requirements**. Tr Arguments 30-31.

III. Summary of departures by the Fifth Circuit from provisions in State and Federal constitutions, statutes, its own decisions and those of other Federal appeals courts, and from those of the Supreme Court.

The main question addressed in this petition is whether, in the United States of America, citizens may enter a County courthouse to conduct routine business with elected and appointed county officials without risking loss of liberty at the hands of officials who are facilitated and protected by members of the bar, other officials and the county; and who profit substantially from extortion involving threat of and actual loss of liberty.

The specific issues Petitioner requests to put before the Supreme Court is whether a jury's finding of the facts, supported by extensive testimony and documentary evidence, may be reversed by a district court without explanation, except that concocted by the opposing party in response to an order by the appeals court over a year and a half later. A further issue is whether an appeals court may uphold such reversal by creating its own "facts" that are nowhere to be found in the record, and whether such "facts" may be used as the basis for imposing sanctions against a pro se civil rights litigant whose allegations had been upheld by two grand juries and a federal district trial jury. Also at issue is whether a federal appeals court may issue an abstract of judgment for a lien against Texas homestead property to satisfy an award for attorney's fees and costs against said pro se civil rights litigant.

A. The civil rights violation: deprivation of liberty without due process

To state a claim under *42 U.S.C. § 1983*, plaintiffs must allege facts sufficient to establish that they were deprived of an interest secured by the Constitution or laws of the United States, and that the deprivation of that interest was caused by a person or persons acting under color of state law. *Gomez v Toledo* 446 U.S. 635 100 S.Ct. 1920 (1980). The first step in analyzing a §1983

claim is to identify the specific constitutional right that allegedly was infringed. *Albright v Oliver* 114 S. Ct. 807 (1994) *Graham v O'Connor* 490 U.S. 386, 109 S.Ct. 1865 (1989).

Deprivation of liberty without due process is a violation of the *Fifth and Fourteenth Amendments of the United States Constitution.* Petitioner has set forth above the evidence he presented at trial to show that he was deprived of liberty, that neither he nor the bailiff who was ordered to take him into custody was never shown any document charging him with contempt or any other offense.

B. The civil rights violation: denial of due process

Under Texas law, unless documents that contain sworn attestations as to the circumstances under which a citizen was held in either direct or constructive contempt exist, he cannot have been lawfully detained for contempt.

Under Texas law, no one may be restrained for contempt, either direct or indirect, without written order of commitment *Supercinski v State* 561 SW2d 482 (1977). Where no written judgment or order of contempt exists, there is no finding upon which an order of commitment can be predicated *Ex Parte Barnett* 600 SW2d 252 (Tx. Sup. Ct. 1980). As mentioned above, a search of Blalack's records for the month of April 1991 show no record of Petitioner's arrest; the records are serially numbered and the sequence of numbers is uninterrupted.

C. Municipal liability.

A municipal body can be held liable for injuries to citizens that are the foreseeable result of actions or failures to act by its policymakers.

Since *Monell v New York City Social Services Department* 436 U.S. 658 (1978) was issued by the Supreme Court, the

Fifth Circuit itself, and all other circuits have held a municipal body liable for constitutional violations inflicted upon citizens that resulted from a custom or policy of one or more of the municipality's policymakers.

In *Bennett v City of Slidell* 728F.2d 762 (5th Cir. 1984) the Fifth Circuit, sitting *en banc*, held that municipal liability must rest on official policy, not that of an individual official. The policy is that of the municipality where it is made by an official under authority to do so given by the governing authority. Policymakers act in the place of the governing body. The court further held that culpable policy is attributable to the governing body only when made or done by an official to which the governing body has given authority to act or to make policy *Thomas v Sams* 734 F.2d 185 (5th Cir. 1984). The Supreme Court of Texas held that juries are the best arbiters of the facts and awards of damages against a municipality, and that a plaintiff must show both wanton, malicious, or grossly negligent behavior and actual imputation to the municipal leaders *City of Gladewater v Pike* 727SW 2d 514 (Tx. SupCt. 1987).

D. Municipal liability due to negligence and indifference

Municipal liability is incurred by intentional negligence and callous indifference to the harm that persons are likely to suffer therefrom.

"Under Texas law, negligence consists of four essential elements: (1) a legal duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) actual injury to the plaintiff; and (4) a showing that the breach was a proximate cause of the injury." *Skipper v United States* 1F3d 349 (5th Cir 1993) cert den. 114 S.Ct. 1220 (1994).

(1) Lubbock County and County Judge Don McBeath, as final policymakers for Lubbock County, owe a legal duty to Gerard Hennessey to protect his rights under the constitutions and laws of the United States and the State of Texas. Petitioner con-

tends that they are obliged to ensure that he may freely carry our lawful business in Lubbock County Courthouse without risk of loss of liberty for making a lawful request of a County employee.

(2) Lubbock County and County Judge Don McBeath, final policymakers for Lubbock County, breached that duty by refusing and failing to take actions available to them to deal with L. J. Blalack's widely-known longstanding pattern and practice of false arrests, overfining and other civil rights abuses.

In *Pembaur v Cincinnati* 475 U.S. 469, 106 S.Ct. 1292 (1985) the Supreme Court held that "official policy" can include **failure or neglect to act, especially when there is a financial benefit that provides the nexus between failure to act and benefit.** Blalack's abuses generated significant income for Lubbock County and for Don McBeath himself, and both took steps to prevent other officials from access to Blalack's records so they could not take the actions necessary to bring Blalack's abuses to an end. In *Cornfield v Consolidated High School District* 991 F2d 1316 (3rd Cir. 1993), the Third Circuit held that "a practice of unconstitutional conduct, although lacking formal approval, may provide a basis for municipal liability" if the plaintiff can establish that the **policymaking authority acquiesced in a pattern of unconstitutional conduct.** The court held that a municipal "custom" may be established by proof of the knowledge of the policymaking officials and their acquiescence in the established practice; the **longstanding or widespread nature of a particular practice would support the inference that policymaking officials "must have known about it but failed to stop it."**

In *Dahlberg v Becker* 748 F2d 85 (2ndCir, 1984) the Second Circuit held that "**Plaintiffs in §1983 cases need not allege a pattern of behavior in cases...where the state official acts intentionally rather than negligently**. The reason is plain. Given an actor's presumed control over his intended actions, one intentional act can signify the presence of a 'rule of conduct' even through in its infancy. Thus there is a good reason for an actor to be held responsible for his intentional behavior as opposed to his

mere inadvertence." When he instructed the Lubbock County Computer Department to block access by Justice of the Peace Jim Hansen and Constable Gary Newburn to L. J. Blalack's court records, County Judge Don McBeath, a policymaker for Lubbock County, carried out an intentional official act that incurred municipal liability defined by the Second Circuit.

(3) Petitioner was injured by an unlawful deprivation of liberty at the hands of former Justice of the Peace L. J. Blalack, as described above.

(4) The proximate cause of Petitioner's false arrest by L. J. Blalack was a series of actions and decisions not to act by Lubbock County and its policymaking officials, who were motivated by revenue generated from Blalack's abuse of citizens' constitutional and civil rights for at least seven years.

The Texas Supreme Court holds **that the two elements of proximate cause are cause-in-fact and foreseeability**. *Williams v Steves Industries Inc.*, 699 S.W.2d 570 (Tex 1985) *McClure v Allied Stores of Texas Inc.* (608 S.W.2d 901 (Tex 1980) *Missouri Pacific R. Co v American Statesman* 522 S.W. 2d 99 (Tex 1977). Cause-in-fact means that the omission or act involved was a substantial factor in bringing about the injury and without which no harm would have occurred. Foreseeability requires that the actor, as a person of ordinary intelligence, would have anticipated the danger that his negligent act created for others. *Nixon v Mr. Property Management Co. Inc.* 690 S.W. 2d 546 (Tex 1985). Foreseeability does not require that a person anticipate the precise manner in which the injury will occur.

Contrary to the findings of fact set forth in the Fifth Circuit's opinion, there is no question but that Lubbock County and Don McBeath knew about Blalack's abuses, and despite this knowledge took specific actions to facilitate Blalack's continued abuse of citizens and prevent other officials from taking actions to bring his abuses to an end. Petitioner presented the evidence that is summarized above to the jury, and they accepted this overwhelming evidence.

Whether L. J. Blalack was a policymaker for Lubbock County is immaterial in determining whether Lubbock County can be held liable for his false arrest of Petitioner. Rather, the issue is whether Lubbock County Commissioners Court and County Judge Don McBeath did knowingly and intentionally protect and facilitate L. J. Blalack's civil rights abuses over a period of several years. Also at issue is whether this protection and facilitation was of such a nature and extent that any reasonable person could anticipate that Petitioner could be falsely arrested by entering Blalack's office for the purpose of requesting access to case records containing material that would adversely affect one of Blalack's main political campaign fund contributors, J. David Nelson.

E. A motion for judgment as a matter of law to reverse a jury verdict can only be granted when there is no evidence to support the jury verdict.

Petitioner asks the Supreme Court to review the decisions of the district and appellate courts on the grounds of abuse of discretion when they reversed of the jury verdict of the May 9-12 1994 trial. Reversing a verdict based on the preponderance of the evidence is contrary the Seventh Amendment of the Constitution of the United States, as well as decisions of the Supreme Courts of Texas and the United States, and those of other circuits and the Fifth Circuit itself. The Fifth Circuit itself recently granted an appeal against the reversal of a jury verdict by the same district court, on the grounds that the preponderance of the evidence supported the verdict *Gutierrez and Ruiz v Excel Corp.* 94-11147 (5th Cir, Jan 23, 1996*)*.

When reviewing the granting of a motion to disregard a jury finding, an appellate court uses a legal sufficiency or "no evidence" test. **The court may consider only the evidence and reasonable inferences therefrom which, when viewed in their most favorable light, support the jury finding**. *City of Glade-water v Pike* 727 SW2d 514 (Tex. Sup. Ct. 1987). The traditional "no evidence" test for appellate review applies to gross negligence

findings *Wal-Mart Stores, Inc. V. Alexander* 868 SW2d 322 (Tex Sup Ct. 1993). Petitioner submits that nowhere in the entire record of the American judiciary is there any precedent for a appellate court to make up its own "facts".

"A motion for judgment as a matter of law should be granted by the trial court only if, **after considering all the evidence in the light and with all reasonable inferences most favorable to the party opposed to the motion,** the facts and inferences point so strongly and overwhelmingly in favor of one party that the court concludes that reasonable people could not arrive at a contrary verdict." *Texas Farm Bureau v United States*, 53 F3d 120 (5th Cir 1995).

Reversal of an award holding a municipal body liable for constitutional violations resulting from a custom or policy of one or more of the municipality's policymakers is not warranted when a local government and its policymaking official(s) have taken active steps to protect and facilitate an elected official known to engage in a pattern and practice of extensive and severe abuse of civil and constitutional rights, contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States, 42 U.S.C. §1983 et seq., and the decisions of the Supreme Courts of Texas and the United States, and those of the other circuits and the Fifth Circuit itself.

F. Awarding attorney's fees and double costs to the prevailing defendant in a civil rights action on the grounds of a frivolous appeal, when based on "facts" that are contrary to the pleadings and the record, is an abuse of discretion.

Petitioner can find no instance throughout the entire Federal circuit in which a circuit court has imposed sanctions against a pro se civil rights plaintiff based on a significant finding of "fact" that is completely in opposition to the record, as in this case in which the Fifth Circuit held that the complaint against Nelson had been dismissed "early in the proceedings before

depositions and discovery" when in fact **Nelson's motion for judgment on the pleadings was not granted until May 2, 1994, the day on which the case was scheduled to go to trial, *after* an 11-hour deposition and discovery had been completed**. The district court had denied two previous motions for dismissal by Nelson; if the action had been meritless, the district court could have dismissed the complaint against Nelson along with those against admitted perjurers Rosemarie Chivers and Melissa Martin. The trial was delayed one week at the request of defendants' counsel on the grounds that he was moving and his wife needed his help that week. **Had the district court not granted this delay, Nelson would have had to go to trial** with Don McBeath and Lubbock County. Petitioner contends that had his complaint been totally without substance, the district court would not have waited until the 11th hour, after **having denied Nelson's previous motion to dismiss.**

Furthermore, the district court cited the Fifth Circuit's *United States of America v State of Mississippi* 921 F2d 604 (5th Cir 1991) and *Jones v Texas Tech* 656 F.2d 1137 (5th Cir. 1981) when it denied Lubbock County's motion for attorney's fees specifically because **"the claim of Gerard Hennessey was not frivolous, unreasonble, or groundless"** R324.

The District Court also **denied L. J .Blalack's motion for attorney's fees** R238 citing *Johnson v Georgia Highway Express* 48 F2d 714 (5th Cir. 1974).

The Supreme Court holds that while the district court may impose Rule 11 sanctions against a pro se litigant for filing a frivolous claim, **the court must construe pro se pleadings liberally** *Haines v Kerner*, 404 U.S. 519 (1972); this has since been followed by the circuits, e.g. *Cook v Peter Kiewit Sons Co. 775 F.2d 1030 (9th Cir 1985).* In *Mission Oaks Mobile Home Park v City of Hollister* 989 F.2d 359, 114 S.Ct. 1052, the Supreme Court upheld the Ninth Circuit's decision that declined to impose sanctions because the appellant's contentions were not

wholly without merit.

District courts in general are relied upon in the first instance to determine whether sanctions are appropriate "given that the district court is most intimately familiar with the case and its nuances" *Foster v. Mydas Associates, Inc.* 943 F.2d 139 (1st Cir, 1991). Some circuits have equated Rule 11 with Rule 38, and apply the conditions and sanctions equally. Where Rule 11 sanctions in a civil rights case are appealed, the First Circuit reviews only for abuse of discretion, nevertheless **requiring that the district court provide concrete findings of fact, along with a clear explanation of the reasons for a particular sanction.**

Petitioner claims that the Fifth Circuit has ignored the district court record to such an extent that its award of attorney's fees is an abuse of discretion and contrary to the decisions of the Supreme Court, its sister circuits, and itself, under similar circumstances.

Under 42 U.S.C. § 1988, **prevailing defendants are entitled to attorney's fees *only* when a plaintiff's underlying claim is frivolous, unreasonable, or groundless**, or that the plaintiff continued to litigate after it clearly became so...The test for frivolity is whether the case is so lacking in merit that it is groundless, and not whether the claim was ultimately successful."

In *Fogerty v Fantasy* 114 S.Ct. 1023 (1994) the Supreme Court unanimously held that **plaintiffs in civil rights cases are to be treated differently than defendants with regard to award of attorney's fees**, on the grounds that:

> "Oftentimes, in the civil rights context, impecunious "private attorney general" plaintiffs can ill afford to litigate their claims against defendants with more resources. Congress sought to redress this balance in part, and to provide incentives for the bringing of meritorious lawsuits, by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorney's fees...we determined that the same policy considerations

were not at work in the case of a prevailing civil rights defendant..."

Petitioner claims to have been acting as such a *private attorney general* in his pursuit of this action *pro se*, having spent well over $25,000 on the case.

In *Johnson v Georgia Highway Express Inc.* 488 F2d 719 (1974) the Fifth Circuit held that **legislation allowing attorney's fees was passed to enable litigants to obtain competent counsel, not as a penalty for pursuing an unsuccessful action**.

A prevailing defendant in a civil rights case is entitled to fees and costs only if the defendant can establish that the plaintiff's suit was totally unfounded, frivolous or otherwise unreasonable. *Marie Hogar Geriatrico, Inc. v Rivera-Santos* 38F.3d 615 (1st Cir. 1994) The Seventh and Ninth Circuits define a frivolous appeal as one in which "the result is obvious, or the arguments of error are wholly without merit." *Wilcox v Commissioner* 848 F.2d 1007 (9th Cir. 1988), *Spraying Sys. Co. V Delavan, Inc.* 975 F.2d 387 (7th Cir. 1992) *Grimes v Commissioner* 806 F.2d 1454 (9th Cir. 1986) does not impose sanctions lightly as an appeal that lacks merit is not always frivolous. In the instant case, the district court held that Petitioner's complaint was not frivolous or meritless.

G. Ordering issuance of an abstract of judgment to allow a prevailing civil rights defendant to file a lien against Texas homestead property is contrary to the Fifth Circuit's own decisions as well as those of the Texas and United States Supreme Courts..

The issue of enforcing an award in a civil action by filing a lien in the county in which the non-prevailing party resides in homestead property is an unconstitutional deprivation of property without due process. In *Auclair v Sher* 63 F.3d 407 (5th Cir. 1995), the Fifth Circuit held that the rights of the private individual to enforce an award by a Federal court are not as extensive as those

of the Federal government except for an award to a victim of a Federal crime. In particular, the Fifth Circuit held that issuing an abstract of judgment could cloud the non-prevailing party's title to homestead property. Furthermore, in *In re Niland* 825 F2d 801 (5th Cir. 1987) the Fifth Circuit upheld the Texas Constitution which forbids the fixing on the homestead of liens other than for purchase money, for taxes on the property, or for work and materials used for improvements. Petitioner filed documents with the Fifth Circuit showing that his property in Lubbock County is his homestead.

For this reason, Petitioner requests the Supreme Court to review the Order of the Fifth Circuit on the grounds of error and abuse of discretion because it grants to J. David Nelson an abstract of judgment in order to file a lien against Petitioner's homestead property.

H. The court cannot rely on the testimony or statements of L. J. Blalack and his assistant Melissa Martin.

In her sworn statement to Texas Ranger Jim Mull, Melissa Martin stated that **Blalack's reason for instructing his staff to prepare, execute, swear and have notarized false statements about the circumstances surrounding his unlawful detention of Appellant Hennessey on April 9, 1991 was to avoid prosecution by the Texas Judicial Conduct Commission for violation of Hennessey's due process rights.** Blalack had earlier threatened Vince Gonzales with jail for seeking access to Blalack's court records. Former Justice of the Peace L. J. Blalack was indicted on January 7, 1993, for felony aggravated perjury to the Lubbock County Grand Jury for making the same false statements to them; **this case has yet to come to trial**. Three finders of fact--including the trial jury--have disregarded Blalack's version of events.

Two finders of fact have found Blalack's version of events to be so far from the truth that they have indicted Blalack and his assistant Melissa Martin for perjury. The

January 7, 1994, Lubbock County grand jury indictment of Blalack for felony aggravated perjury shows that Blalack's testimony to them--essentially the same testimony that Blalack gave during the May 9-12 trial and which the court below cites as fact--could not be believed and was intentionally false. The indictment states that Blalack testified to them that Appellant "was loud, rude and abusive in the office and courtroom of Blalack," that Blalack's testimony was false and was made during and connection with an official proceeding, and that it was material to the proceeding. The Grand Jury also indicted Blalack for misdemeanor official oppression, and misdemeanor official misconduct. The record shows that the Grand Jury also indicted Blalack's assistant Melissa Martin on misdemeanor perjury for making a false sworn statement concerning the incident in Blalack's courtroom. **Martin's sworn statement made to Texas Ranger Jim Mull stated that her initial sworn statement, prepared at Blalack's direction, described conduct by Appellant Hennessey that she subsequently admitted never occurred.** For making this false sworn statement, she pled nolo contendere to a charge of perjury and was sentenced in March 1994. This conviction was subsequently upheld by the Texas Seventh District Court of Appeals Melissa Martin v State of Texas 896 SW2d (March 16, 1995). The courts below are obliged to disregard her completely unreliable testimony, as did the jury.

V. SUMMARY

Petitioner respectfully requests the Court to grant his Petition for Writ of Certiorari, on the grounds that the dismissal of Petitioner's appeal of the reversal of the jury verdict and award violate constitutional and statutory principles, and that the courts below have created "facts" that cannot be found in the record, except in the testimony of Blalack--an indicted perjurer--and his assistant Melissa Martin, who pled *nolo contendere* to a charge of perjury for her sworn false statement about Petitioner's conduct and the events that occurred in Blalack's court when Petitoner was arrested on April 9, 1991.

Petitioner also respectfully requests the Court to agree to review the Fifth Circuit Court of Appeals' award of attorney's fees and double costs for filing a frivolous appeal, on the grounds that the Fifth Circuit's decision was based on "facts" that are contrary to the pleadings and the record, and contrary to decisions by the Fifth Circuit itself, other Circuit Courts, the Supreme Court of the State of Texas, and the United States Supreme Court.

Lubbock County Commissioners and County Judge Don McBeath, as final policymakers, had the clear duty and obligation to communicate to Blalack and to the public that his abuses were contrary to county policy. Instead, they increased his facilities, his staff, and his operating budget. They purposely facilitated Blalack's unlawful violation of citizens' rights and protected him from investigation by other officials by blocking access to Blalack's official court records on the County's computer system.

The record shows that the documents required by Texas law *Supercinski v State* 561 S.W. 2d 252 (Cr.App. 1977) to support the restraint of a person for contempt, either direct or indirect, do not exist. The Fifth and Fourteenth Amendments to the United States Constitution clearly prohibit **any** deprivation of liberty without due process of law. Otherwise, it would not be long before corrupt abusive officials such as Blalack could successfully argue that detention in custody without due process for "only a few days" and eventually "a few months" is not really a serious infringement of a citizen's rights.

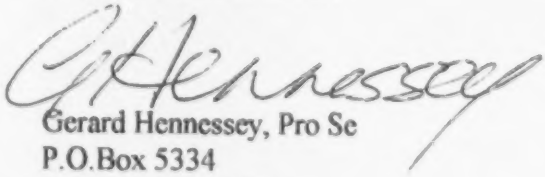
There is no doubt that had Don McBeath not interfered with the investigations of Jim Hansen and Gary Newburn , L. J. Blalack would already have been removed from office or his actions would have been brought under control long before Gerard Hennessey came to the office of Lubbock County Justice of the Peace Court for Precinct One to request access to the Suter case files on April 9, 1991. Thus Petitioner would not have been falsely arrested if Lubbock County and County Judge Don McBeath had not decided not to take action.

Texas county officials have the authority, the responsibility, and the means to take action to bring civil rights abuses by an elected official, including a justice of the peace, to an end. Repeated refusals by Appellees Don McBeath and Lubbock County to deal with Blalack's abuse of Lubbock citizens' civil and constitutional rights was clearly intentional and of sufficient duration to meet *Monell* criteria for a custom or policy that was the proximate cause of Appellant Hennessey's false arrest on April 9, 1991. Appellees Don McBeath and Lubbock County made a custom and policy of protecting and facilitating Blalack's refusal to grant access to his court records; thus they cannot avoid liability for the harm Petitioner--along with at least 500 other Lubbock citizens--suffered in Blalack's court.

Because of J. David Nelson's close political connections with L. J. Blalack, it was reasonable for the court to have weighed the evidence and submitted the question of Nelson's involvement in Petitioner's false arrest to a finder of fact. Just because this was not done, does not mean that Petitioner's complaint was frivolous, especially in the case of a pro se civil rights complaint. Nor does it mean that the Fifth Circuit can concoct its own "facts" from thin air, which it then used to justify award of attorney's fees and double costs followed by an order to issue an abstract of judgment for a lien against Petitioner's homestead property.

For these reasons, Petitioner respectfully requests the Court to grant his petition for Writ of Certiorari.

Respectfully submitted,



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APPENDIX A

Opinions, orders, findings of fact, and conclusions of law, delivered by the Fifth Circuit Court of Appelas, whose decisions are sought to be reviewed.

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

94-10629
GERARD HENNESSEY,
Plaintiff-Appellant,
LINDA ANN VEGA Appellant,

VERSUS

L.J. BLALACK, ET AL.,
Defendants,

DON MCBEATH AND LUBBOCK COUNTY, TX.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(5:93-CV-078-C)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges. PER CURIAM:[1]

Hennessey appeals the district court's order granting the defendants' Rule 50 motions for judgment as a matter of law. The court's order followed by a jury verdict in favor of Hennessey on his pro se § 1983 complaint. We remand this case to the district court for the limited purpose of obtaining a statement of the reasons for its order.

I.

Hennessey's claims against Lubbock County, Texas (the

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[1]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

"County") and Lubbock County Judge Don McBeath center on an altercation between Hennessey and Lubbock County Justice of the Peace L.J. Blalack. Hennessey sought access to complaints filed in Blalack's court by a local attorney. After a heated exchange between Hennessey and Blalack, Blalack charged Hennessey with contempt and requested a deputy sheriff to place him in custody. Before Blalack (sic) was escorted out of the courtroom, however, Blalack withdrew the contempt citation and instructed the bailiff to release Hennessey. Blalack later instructed his court clerks to prepare affidavits stating that Hennessey had been loud and abusive. Several clerks subsequently informed law enforcement officers that Blalack "coached" their affidavits. Blalack was later indicted for perjury and false arrest.

Hennessey filed a §1983 complaint alleging that Blalack's contempt citation violated his constitutional rights and that Blalack conspired with his court clerks to deprive him of his constitutional rights by preparing false and defamatory affidavits. Hennessey also alleged that Judge McBeath and the County conspired with Blalack to violate the civil rights of county residents appearing in Blalack's court. Hennessey alleged that neither McBeath nor the County did anything to help him and other county residents who suffered constitutional deprivations at Blalack's hands. Hennessey further alleged that county officials operated a corrupt enterprise in violation of the Racketeer Influenced and Corrupt Organization Act, 19 U.S.C. §§ 1961-1968 (RICO).

The district court entered Rule 54(b) orders dismissing most of the defendants and dismissing some of Hennessey's claims against the remaining defendants, including Hennessey's RICO claims. The district court then granted summary judgments against Hennessey on the remaining claims except for Hennessey's claims against the County and McBeath.[2] The court denied the defen

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Hennessey filed numerous appeals of the district court's Rule 54(b) orders dismissing claims and defendants. We affirmed the district court's orders dismissing Hennessey's RICO claims. Hennessey v. Blalack, Nos. 93-1808, etc. (5th Cir. August 30, 1994) (unpublished). In another opinion, we affirmed the district court's dismissal of Hennessey's civil rights claims against Blalack.

dants' motions for summary judgment and proceeded to a jury trial on these claims. At the close of the evidence, the court denied the defendants' Rule 50 motions for judgment as a matter of law and submitted the case to the jury. The jury returned verdicts against both defendants and awarded Hennessey $10,000. The defendants then timely renewed their Rule 50 motions. Without explanation, the district court granted the defendants' motions and entered judgment against Hennessey. Hennessey timely appealed.

II.

While the Federal Rules of Civil Procedure do not require the district court to state its reasons for granting a Rule 50 motion, "[i]n all but the simplest case, such a statement usually proves not only helpful, but essential." Jot-Em-Down Store (JEDS) Inc. V. Cotter & Co., 651 F.2d 245, 247 (5th Cir. 1981). In the present case, the district court gave no statement of its reasons for granting the defendants' motions. Given the volume of the evidence presented during trial and the complexity of Hennessey's conspiracy theory, such a statement would be very helpful to us in evaluating the propriety of the district court's order granting the defendants' Rule 50 motions.[3] We therefore remand this case to the district court for the limited purpose of obtaining a statement of the reasons for the court's order granting the defendants' Rule 50 motions. This court's jurisdiction over Hennessey's appeal will remain in abeyance pending receipt of the district court's statement. See Smith v. Texas Dept of Water Resources, 799 F.2d 1026,

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Hennessey v. Blalack, No. 94-10373 (5th Cir. January 26, 1995) (unpublished). Finally, in Hennessey v. Blalack, No. 94-10372 (5th Cir. February 2, 1995) (unpublished), we dismissed Hennessey's appeal as frivolous for raising arguments already decided by this court.

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Approximately 27 witnesses testified during the trial. Most of these witnesses were called by Hennessey to prove that McBeath and other county officials with final policy-making authority conspired with Blalack.

1031(5th Cir. 1986); Jot-Em-Down Store, 651 F.2d at 247.[4]
REMANDED.
U.S. COURT OF APPEALS
FILED JUN 23, 1995
CHARLES R. FULBRUGE III, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 94-10629

GERARD HENNESSEY,
Plaintiff-Appellant,
LINDA ANN VEGA,
Appellant,

versus

L.J. BLALACK, ET AL.,
Defendants,
DON MCBEATH AND LUBBOCK COUNTY, TX,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Texas

5:93-CV-078-C

Before POLITZ, Chief Judge, DAVIS and BENAVIDES, Circuit Judges. PER CURIAM*[5]:

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4 Hennessey filed a motion with this court to supplement the record. We will delay deciding this motion pending receipt of the district court's statement of reasons supporting its Rule 50 order.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the bases of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

On initial consideration of this appeal, we remanded the case to the district court for the limited purpose of obtaining a statement of its reasons for said order. We retained jurisdiction over Plaintiff-Appellant Gerard Hennessey's ("Hennessey") appeal pending receipt of the district court's statement. The statement has been received.

We have carefully considered the record and the arguments advanced by the parties to the appeal and affirm the judgement of the district court, which refused to hold the county liable for the alleged constitutional violations visited upon Hennessey by the Lubbock County, Texas Justice of the Peace L.J. Blalack ("Blalack") for the following reasons:

1. Even assuming a constitutional violation occurred in the manner that Justice of the Peace Blalack carried out his judicial duties, Blalack is not a final policymaker whose actions constituted the policy of Lubbock County, Texas. *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992).

2. The district court correctly concluded that Blalack was not acting pursuant to a custom or policy of Lubbock County, Texas. In this regard we note that there is no support in the record for a conclusion that Hennessey's alleged constitutional deprivations were caused by or resulted from a persistent and widespread practice of county officials or employees that was so common and well settled that it constituted a custom that fairly represented county policy. *See Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir. 1984) (en banc), cert. denied, 472 U.S. 1016, 105 S. Ct. 3476, 87 L.Ed.2d 612 (1985) (record must support conclusion that the persistent, widespread practice of county officials or employees which, although not authorized by officially adopted and promulgated policy, was so common and well settled that it constituted a custom that fairly represented county policy and that actual or constructive knowledge of such custon is attributable to the governing body of the county).

AFFIRMED.

U.S. COURT OF APPEALS
FILED DEC. 11, 1995
CHARLES R. FULBRUGE III, CLERK

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-10530

GERARD HENNESSEY,
Plaintiff-Appellant,

LINDA ANN VEGA,
Appellant,

versus

L.J. BLALACK, ET AL.,
Defendants,

J. DAVID NELSON,
Defendant-Appellee.

****

GERARD HENNESSEY,
Plaintiff-Appellant,

versus

J. DAVID NELSON,
Defendant-Appelle.

Appeals from the United States District Court
for the Northern District of Texas

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges. BY THE COURT:

IT IS ORDERED that Appellee's Motion for Attorney's Fees and Double Costs under 42 U.S.C. § 1988(b) for a frivolous appeal is GRANTED. We award Nelson $2,000 in attorneys fees plus Double Costs.

U. S. COURT OF APPEALS
FILED DEC 19 1995
CHARLES R. FULBRUGE III, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

94-10530

GERARD HENNESSEY,
Plaintiff-Appellant,
LINDA ANN VEGA,
Appellant,
versus
L.J. BLALACK, ET AL.,
Defendants,
J. DAVID NELSON,
Defendant-Appellee.

****

GERARD HENNESSEY,
Plaintiff-Appelant,
versus
J. DAVID NELSON,
Defendant-Appellee.

Appeals from the United States District Court for the
Northern District of Texas

ORDER:

IT IS ORDERED that the motion of appellee to authorize the Clerk to execute abstract of Judgment is /s/ granted.

/s/ W.Eugene Davis
UNITED STATES CIRCUIT JUDGE

U.S. COURT OF APPEALS
FILED FEB 15 1996
CHARLES R. FULBRUGE III, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

94-10530

GERARD HENNESSEY,

Plaintiff-Appellant,

LINDA ANN VEGA,

Appellant,

versus

L. J. BLALACK, ET AL.,

Defendants,

J. DAVID NELSON

Defendant-Appellee.

****

GERARD HENNESSEY,

Plaintiff-Appellant,

versus

J. DAVID NELSON,

Defendant-Appellee

Appeals from the United States District Court for the
Northern District of Texas

ORDER :

IT IS ORDERED that the request of appellant, Gerard Hennessey, to vacate or stay the Court's order on the motion of appellee to authorize the Clerk to execute abstract of Judgment is DENIED.

/s/ W. Eugene Davis
W. Eugene Davis
UNITED STATES CIRCUIT JUDGE
U. S. COURT OF APPEALS
FILED FEB 13 1996
CHARLES R. FULBRUGE III, CLERK

APPENDIX B

Other opinions, orders, findings of fact, and conclusions of law rendered in the case by courts, companion cases

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GERARD HENNESSEY,	)	
	)	
Plaintiff,	)	
	)	NO. 5-93:CV078-C
	)	
vs.	)	
	)	
LUBBOCK COUNTY, and LUBBOCK COUNTY JUDGE DON MacBEATH,	)	
	)	
Defendants,	)	

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Defendants Lubbock County and Don McBeath, in his official capacity as Lubbock County Judge, and, pursuant to the order of this Court, submit the following proposed findings of fact and conclusions of law:

A. FINDINGS OF FACT

Based upon uncontroverted and uncontested pleasings and testimony at the time of trial in this matter, the Court finds the following facts:

1. On April 9, 1991 and at all relevant times, L.J. Blalack was an elected justice of the peace for Precinct 1, Place 1 in Lubbock County, Texas.

2. As such, Judge Blalack was a duly elected judicial official of the State of Texas.

3. On April 9. 1991 Gerard Hennessey went to the offices of Judge Blalack and requested to review judicial records under the control of Judge Blalack. Tr. 466, l. 5-7.

4. Mr. Hennessey was not allowed to see the records requested, but was told he would have to discuss this matter with Judge Blalack.

5. On April 9, 1991, when Gerard Hennessey first came into contact with Judge Blalack, JudgeBlalack was on the bench in his courtroom. Tr. 470-471.

6. After a discussion between Mr. Hennessey and Judge Blalack, Judge Blalack told Mr. Hennessey that Mr. Hennessey needed to have respect for his court. Tr. 472, l. 16-17.

7. Judge Blalack then instructed his clerk, Melissa Martin, to make our a warrant on Mr. Hennessey. Tr. 472, l. 18.

8. After a second discussion between Judge Blalack and Mr. Hennessey, from the bench Judge Blalack ordered that Gerard Hennessey be handcuffed. Tr. 474, l. 3.

9. Judge Blalack ordered Mr. Hennessey arrested for direct contempt of court. Tr. 381, l. 23-25.

10. Judge Blalack ordered Gerard Hennessey released within a few minutes of being hancuffed. Tr. 475, l. 5.

11. Gerard Hennessey was never fined by Judge Blalack.

12. Gerard Hennessey was never sent to jail by Judge Blalack.

B. CONCLUSIONS OF LAW

The Court makes the following conclusions of law:

1. The acts of Judge Blalack were judicial acts.

2. The Texas Constitution provides for the separation of the executive, legislative and judicial branches of state government. Pursuant to Article 2 § 1 of the Texas Constitution, the executive and legislative branches of the government may not control the judicial branch.

3. Thus, Lubbock County cannot control or direct the

judicial acts or conduct of any justice of the peace or other judge, including Judge Blalack.

4. Texas law provides that a judge may hold any individual in direct contempt of court. Texas Government Code §§ 21.001 and 21.002.

5. Thus, Judge Blalack was acting pursuant to state law when he ordered the arrest of the plaintiff on April 9, 1991.

6. A Justice of the Peace acting in his judicial capacity to enforce state law does not act as a county official or lawmaker. Johnson v. Moore, 958 F.2d 92, 94 (5th Cir. 1992).

7. A justice of the peace's deliberate or mistaken departure from controlling state law cannot be said to represent county policy. Bluford v. Taylor, 834 F.2d 1213 (5th Cir. 1988), and Carbalan v. Vaughn, 760 F.2d 662 (5th Cir. 1985).

8. Thus, Lubbock County cannot be responsible for the acts of Judge Blalack when he was enforcing state law even if he deliberately or mistakenly departed from that state law. Carbalan v. Vaughn, 760 F.2d 662 (5th Cir. 1985).

9. Under Texas law, a justice of the peace is not a policy maker for the county. Bigford v. Taylor, 834 F.2d 1213 (5th Cir. 1988).

10. Thus, Judge Blalack was not a policy maker for Lubbock County, Texas.

11. Lubbock County had no authority to establish a custom or policy with respect to the actions complained of by Plaintiff because those actions were the exclusive province of the judicial branch of the government pursuant to the Texas Consitution.

12. Lubbock County cannot be liable for the acts of Judge Blalack because his acts could not be those of Lubbock County because he is not a Lubbock County policy maker, nor was he acting pursuant to a custom or policy of Lubbock County.

13. Judge Blalack's acts were not the acts of Lubbock County nor were they acts for which Lubbock County was or could have been responsible.

14. Lubbock County Commissioners Court had no authority to remove or censure Judge Blalack or any Justice of

the Peace. That power belongs to the Texas Commission on Judicial Conduct.

15. Thus, under the law, Lubbock County could not be liable for the acts of Judge Blalack, and Plaintiff should take nothing from Defendants Lubbock County and Don McBeath and pay costs to Defendants.

16. Furthermore, as a matter of law, Plaintiff did not establish a violation of his constitutional rights because Judge Blalack had the authority to have Mr. Hennessey arrested and/or jailed for direct contempt of court.

17. There are no notice or hearing requirements before one can be held in direct contempt of court, Ex Parte Gordon, 584 S.W.2d 686, 688 (Tex. 1979), and summary punishment for direct contempt does not deprive one of due process of law. Ex Parte Daniels, 722 S.W.2d 707, 709 (Tex. Crim. App. 1987) and Adams v. McIlhaney, 593 F. Supp. 1025, 1028-29 (N.D. Tex. 1984).

18. Thus, Mr. Hennessey cannot even establish a violation of his constitutional rights.

Respectfully submitted,
/s/ Charlotte Bingham
Charlotte Bingham
Texas Bar No. 02322430
Attorney for Lubbock County and
Don McBeath in his official capacity

CRENSHAW, DUPREE & MILAM, L.L.P.
P.O. Box 1499
Lubbock, TX 79408-1499
(806) 762-5281
(806) 762-3510 (Telecopier)

CERTIFICATE OF SERVICE

A true copy of the above and foregoing Proposed Findings of Fact and Conclusions of Law was on this the 14th of July 1995

served upon Plaintiff by forwarding same by First Class United States Mail to:

Plaintiff, Pro Se

Gerard Hennessey
PO Box 5334
Lubbock, TX 79409
Linda Ann Vega
616 30th St.
Lubbock, TX 79404

/s/ Charlotte Bingham
Of Counsel

U.S. District Court Northern District of Texas
FILED JUL 14, 1995
Nancy Doherty, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GERARD HENNESSEY, Plaintiff,	)	
v.	)	
L. J. Blalack, et al., Defendants	)	Civil Action No. 5:93-CV-078-C

ORDER

The Fifth Circuit Court of Appeals has remanded the above case for the limited purpose of obtaining a statement of reasons for the granting of the Rule 50 motion in favor of the Defendants.

Defendants shall submit proposed findings and conclusions by 9:00 a.m. July 14, 1994.

SO ORDERED.

Entered this 27th day of June, 1995.

/s/SAM R. CUMMINGS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GERARD HENNESSEY,	)	
Plaintiff,	)	
v.	)	
L. J. Blalack, et al.,	)	Civil Action No.
Defendants	)	5:93-CV-078-C

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to the direction of the Fifth Circuit Court of Appeals, the Court enters the following findings of fact and conclusionsof law in support of the Court's judgment heretofore entered in this case:

1. On April 9, 1991, and at all relevant times, L. J. Blalack was an elected justice of the peace for Precinct 1, Place 1 in Lubbock County, Texas.

2. As such, Judge Blalack was a duly elected judicial official of the State of Texas.

3. On April 9, 1991, Gerard Hennessey went to the offices of Judge Blalack and requested to review judicial records under the control of Judge Blalack. Tr 466, 1. 5-7.

4. Mr. Hennessey was not allowed to see the records requested but was told he would have to discuss this matter with Judge Blalack.

5. On Paril 9, 1991, when Gerard Hennessey first came into contact with Judge Blalack, Judge Blalack was on the bench in his courtroom Tr 470-71.

6. After a discussion between Mr. Hennessey and Judge Blalack, Judge Blalack told Mr. Hennessey that Mr. Hennessey needed to have respect for his court. Tr 472, 1. 16-17.

7. Judge Blalack then instructed his clerk, Melissa Martin, to make out a warrant on Mr. Hennessey. Tr 472, 1.18.

8. After a second discussion between Judge Blalack

and Mr. Hennessey, from the bench Judge Blalack ordered that Gerard Hennessey be handcuffed. Tr. 474, 1.3.

9. Judge Blalack ordered Mr. Hennessey arrested for direct contempt of court. Tr 381, 1. 23-25.

10. Judge Blalack ordered Gerard Hennessey released within a few minutes of being handcuffed. Tr. 475, 1.5.

11. Gerard Hennessey was neverfined by Judge Blalack.

12. Gerard Hennessey was never sent to jail by Judge Blalack.

The Court makes the following conclusions of law:

1. The acts of Judge Blalack werejudicial acts.

2. The Texas Constitution provides for the separation of the executive, legislative, and judicial branches of state government. Pursuant to Article 2 §1 of the Texas Constitution, the executive and legislative branches of the government may not control the judicial branch.

3. Thus, Lubbock County cannot control or direct the judicial acts or conduct or any justice of the peace or other judge, including Judge Blalack.

4. Texas law provides that a judge may hold any individual in direct contempt of court. Texas Government Code §§ 21.001 and 21.002.

5. Thus, Judge Blalack was acting pursuant to state law when he ordered the arrest of the plaintiff on April 9, 1991.

6. A justice of the peace acting in his judicial capacity to enforce state law does not act as a county official or lawmaker. Johnson v Moore, 958 F.2d 92, 94 (5th Cir. 1992).

7. A justice of the peace's deliberate or mistaken departure from controlling state law cannot be said to represent county policy. Bigford v. Taylor, 834 F.2d 1213 (5th Cir. 1988), and Carbalan v. Vaughn, 760 F.2d 662 (5th Cir. 1985).

8. Thus, Lubbock Countyu cannot be responsible for the acts of Judge Blalack when he was enforcing state law even if he deliberately or mistakenly departed from that state law. Carbalan v. Vaughn, 760 F.2d 662 (5th Cir. 1985).

9. Under Texas law, a justice of the peace is not a policy maker for the county. Bigford v. Taylor, 834 F.2d 1213 (5th Cir. 1988).

10. Thus, Judge Blalack was not a policy maker for Lubbock County, Texas.

11. Lubbock County had no authority to establish a custom or policy with respect to the actions complained of by Plaintiff because those actions were the exclusive province of the judicial branch of the government pursuant to the Texas Constitution.

12. Lubbock County cannot be liable for the acts of Judge Blalack because his acts could not be those of Lubbock County because he is not a Lubbock County policy maker, nor was he acting pursuant to a custom or policy of Lubbock County.

13. Judge Blalack's acts werenot the acts of Lubbock County nor were hey acts for which Lubbock County was or could have been responsible.

14. Lubbock County Commissioners Court had no authority to remove or censure Judge Blalack or any Justice of the Pleace. That power belongs to the Texas Commission on Judicail Conduct.

15. Thus, under the law, Lubbock County could not be liable for the acts of Judge Blalack, and Plaintiff should take nothing from Defendants Lubbock County and Don McBeath and pay costs to defendants.

16. Furthermore, as a matter of law, Plaintiff did not establish a violation of his constitutional rights because Judge Blalack had the authority to have Mr. Hennessey arrested and/or jailed for direct contempt of court.

17. There are no notice or hearing requirements before one can be held in direct contempt of court, Ex Parte Gordon, 584S.W.2d 686, 688 (Tex 1979), and summary punishment for direct contyempt does not deprive one of due process of law. Ex Parte Daniels, 722 S.W.2d 707, 709 (Tex. Crim.App.1987), and Adams v McIlhaney, 593 F.Supp. 1025, 1028-29 (N.D. Tex. 1984).

18. Thus, Mr. Hennessey cannot even establish a

violation of his contitutional rights.

SO ORDERED this 14th day of July, 1994.

/s/ SAM R. CUMMINGS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GERARD HENNESSEY,	)	
Plaintiff,	)	
v.	)	
L. J. Blalack, et al.,	)	Civil Action No.
Defendants	)	5:93-CV-078-C

ORDER

After consideration of the Motion for Attorney's Fees and Expense of Counsel for Defendant, Lubbock County, Texas, filed June 27, 1994, the court is of the opinion that the motion must be denied because the claim of Gerard Hennessey was not frivolous, unreasonable or groundless. See United States of America v. State of Mississippi, 921 F.2d 604, 609 (5th Cir. 1991), citing Jones v Texas Tech University, 656 F.2d 1137, 1145 (5th Cir. 1981). The defendant County of Lubbock has not even argued that Hennessey's claim had no merit.

It is, accordingly, ordered that the Motion for Attorney's Fees and Expense of Counsel is DENIED.

Dated August 16, 1994.

/s/ SAM R. CUMMINGS
United States District Judge

FILED August 16, 1994, Nancy Doherty, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GERARD HENNESSEY,	)	
Plaintiff,	)	
v.	)	
L. J. Blalack, et al.,	)	Civil Action No.
Defendants	)	5:93-CV-078-C

ORDER

Came on for consideration the motion of Lubbock County for judgment as a matter of law, together with the response of the Plaintiff, Gerard Hennessey.

Having considered the motion together with the response, the Court is of the opinion that the motion should be GRANTED.

The judgment signed on May 12, 1994, is hereby set aside and a take nothing judgment shall be rendered in favor of Defendant, Lubbock County.

SO ORDERED.

Signed this 13th day of June, 1994.

/s/SAM R. CUMMINGS
United States District Judge

FILED June 13, 1994
Nancy Doherty, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GERARD HENNESSEY,	)	
Plaintiff,	)	
v.	)	
L. J. Blalack, et al.,	)	Civil Action No.
Defendants	)	5:93-CV-078-C

JUDGMENT

On this date the Court has entered an order grnating Defenant Lubbock County's Motion for Judgment as a Matter of Law. The following judgment is, therefore, entered:

It is accordingly ORDERED, ADJUDGED, and DECREED that the Plaintiff, GERARD HENNESSEY, take nothing as against the Defendant, LUBBOCK COUNTY, TEXAS. All court costs are hereby taxed against Plaintiff, GERARD HENNESSEY.

Signed this 13th day of June, 1994.

/s/ SAM R. CUMMINGS
United States District Judge

FILED June 13, 1994
Nancy Doherty, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GERARD HENNESSEY,	)	
Plaintiff,	)	
v.	)	
L. J. Blalack, et al.,	)	Civil Action No.
Defendants	)	5:93-CV-078-C

JUDGMENT

The above-styled and -numbered cause came on for trial. The parties announced ready. A jury was duly qualified and impaneled.

After hearing the testimony and argument of counsel, the jury retired to consider their verdict. Upon completion of their deliverations, the jury returned into open court their verdict, which was accepted by the Court and ordered filed with the other papers of this cause. The verdict is referred to and incorporated herein as

if set forth in full.

Based on such verdict, the Court renders the following judgment:

It is ORDERED, ADJUDGED, and DECREED that Plaintiff, GERARD HENNESSEY, do have and recover judgment in the sume of $10,000.00 as against Defendant, Lubbock County, Texas, together with interest from the date of judgment until paid at the rate of 5.02 percent per annum. All court costs are taxed against Defendant.

Entered this 12th day of May, 1994.

/s/ SAM R. CUMMINGS
United States District Judge

FILED May 12, 1994
Nancy Doherty, Clerk

APPENDIX C

Orders on rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10629

GERARD HENNESSEY,

Plaintiff-Appellant,

LINDA ANN VEGA,

Appellant,

versus

L.J. BLALACK, ET AL.,

Defendants,

DON MCBEATH and LUBBOCK COUNTY, TX.,

Defendants-Appellees.

Appeals from the United States District Court for the
Northern District of Texas

ON PETITION FOR REHEARING

(January 10,1996)

Before POLITZ, Chief Judge, DAVIS and BENAVIDES, Circuit Judges. PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:
United States Circuit Judge
CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.
U.S. COURT OF APPEALS FILED JAN 10 1996, CHARLES R. FULBRUGE III, CLERK

APPENDIX D

Other appended materials

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

GERARD HENNESSEY,
Plaintiff
v
COUNTY OF LUBBOCK and
DON MCBEATH,
Civil Action No. 5:93-CV-078-C

COURT'S CHARGE TO THE JURY AND JURY VERDICT

MEMBERS OF THE JURY:

Now that you have heard all of the evidence, it becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law tothe facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts ofthis case, you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will

carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by your as an action between persons of equal standing in the community, and holding the same or similar stations in life. A governmental entity is entitled to the same fair trial at your hands as is a private individual. The law is no respecter of persons, and all persons, including governmental entitities, stand equal before the law and are to be dealt with as equals in a court of justice.

When a governmental entity is involved, of course, it may act only through natural persons as its agents or employees; and, in general, any agent or employee of a governmental entity may bind the governmental entity by his acts and declarations made while acting within the scope of his authority delegated to him by the governmental entity, or within the scope of his duties as an employee of the governmental entity.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admittedin thecase. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that aremost significant or most helpful to their side of the case, and in so doing, to call yu attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recolleciton and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

Generally speaking, there are two types of evidence which a jury may considerin properlyfinding the truth as to the facts in this case. One is direct evidence--such as testimony of an eyewitness. The other is indirect or circumstantial evidence--the proof of a chain of circumstances which points to the existence or nonexistence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires

that the jury find the facts from a preponderance of all the evidence, both direct and circumstantial. So, while you should consider o he evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel arejustified in the lgiht of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony andevidence in thecase.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his testimony. In weighing the testimony of a witness, you should consider his relationship to the plaintiff or to the defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, acceptorrejectthe testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of an smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

The burden is on a party in a civil action such as this to prove every essential element of his claim by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and comparedwith that opposed to it, has moreconvincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In order words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the

testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have introduced them. If the proof should fail to establish any esstential element of a party's claim by a preponderance of the evidence, the jury should find for the opposing party as to that claim.

A witness may be "impeached" or discredoted by contradictory evidence, by a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time he or she said or did something, or failed to say ordo something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, it is in your exclusive province to give the testimony of that witness such credibility or weight, if any, as you think it deserves.

In answering the questions which I will submit to you, answer "yes" or "no" unless otherwise instructed. A "yes" answer must be based on a perponderance of the evidence. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no."

After I have completed reading this Charge to you and have reviewed theverdict form, instructions, and jury questions, counsel will have the opportunity to make their cosing arguments.

Your verdict must represent a considered judgment of each juror. In order to return a verdict, it is necessary that all members of the jury agree thereto. You may not therefore enterinto an agreement to be bound by a majority or any vote other than a unanimous one.

Remember at all times you are not partisans. You are judges--judges of the facts. Your sole interst is to seek the truth from the evidence in the case.

Upon retiring to the jury room, you should first select one of your number to act as your presiding officer who will preside over your deliberations and will be your spokesman here in Court. A verdict form has been prepared for your convenience. You presiding officer will sign in the space provided below after you have reached your verdict.

If, during your deliberations, you wish to communicate wih

the Court, you should do so only in writing by a note handed to the Deputy Marshal and signed by the presiding officer.

Underthe Constitution of the United States, as citizen has the right to his liberty and the right not to be arrested unlawfully.

A person my sue for an award of money damages against anyone who, "under color" of any state law or custom, intentionally violates his rights under the Constitution of the United States.

The Plaintiff must prove each of the following by a preponderance of the evidence:

1. That his federal constitutional right not to be unlawfully arrested and deprived of his liberty has intentionally violated;
2. That his rights were violated "under color" of the authority of the State of Texas; and
3. That those acts were the legal cuase of the plaintiff's damages.

The plaintiff claims that the County of Lubbock is liable for the alleged constitutional deprivaton. A county is liable for the deprivation of a constitutional right if the deprivation was pursuant to governmental custom, policy, ordinance, regulation, or decision. Therefore, if you find tht the plaintiff was injured as the proximate or legal result of the County of Lubbock's policy, custom, ordinance, regulation, or decision, whether made by its lawmakers or by those officials whose edicts or acts may fairly be said to represent official policy, the County itself weill be responsible.

The County Commissioners and County Judge Don McBeath are officials whose acts constitute official policy of the County of Lubbock. Therefore, if you find thatthe acts of the county commissioners court of County Judge Don McBeath deprived the plaintiff of a constitutional right, the County of Lubbock is liable for such deprivation.

The plaintiff must also prove by a preponderance of the evidence that the act or failure to act by the defendants was a cause-in-fact of the damage plaintiff suffered. An act or a failure to act is a cause-in-fact of an injury or damages if it appears from the evidence that the act or omission played a substantial part in

bringing about or actually causing the injury or damages. The plaintiff must also prove by a preponderance of the evidence thatthe act or failure to act by the defendants was a proximatecause of the damage plaintiff suffered. An act or omission is a proximate cause of the plaintiff's injuries or damages if it appears from the evidence thatthe injury or damage was a reasonably foreseeable consequence of the act or omission. If the plaintiff has proven his claim against the defendants by a preponderance of the evidence, you must determine the damages, if any to which the plaintiff is entitled. You should not interpret the fact that I have given instructions about the plaintiff's damages as an indication in any way that I believe that the plaintiff should, or should not, win this case. It is your task first to decide whether the defendants are liable. I am instructing you on damages only so that you will have guidance in the event you decide that the defendants are liable and that the plaintiff is entitled to recover money from the defendants.

In order to recover against the County of Lubbock plaintiff must show that some custom or policy caused the deprivation of his constitutional rights.

A "policy" must be a deliberate and conscious choice by a policy-maker. Failure to adopt a precaution can be the basis of Section 1983 liability. Such an omission must amount to an intentional choice. The failure to adopt a precaution must not be merely an unintentionally negligent oversight.

The failure to adopt a policy does not constitute such an intentional choice unless it can be said to have been "deliverately indifferent." The failure to adopt a policy can be deliberately indifferent when it is obvious that the likely consequences of not adopting a policy will be a deprivation of constitutional rights.

If you find that defendants areilable to the plaintiff, then you must determine an amount, if any, that is fair compensation for all of the plaintiff's damages, if any. These damages are called compensatory damages. The purpose of compensatory damages is to make the plaintiff whole--that is, to compensate the plaintiff for the damage that the plaintiff has suffered. Compensatory damages are not limited to expenses that the plaintiff mayhave incurred because of his injury. If the plaintiff's rights have been violated, he

is entitled to compensatory damages forthe physical injury, pain and suffering, mental anguish, shock and discomfort that he has suffered because of the defendants' conduct.

You may award compensatory damages onlyfor injuries that the plaintiff proves wereproximately caused by the defendnats' allegedly wrongful conduct. The damages that you award must be fair compensation for all of the plaintiff's damages, no more and no less. Damages are not allowed as a punishment and cannot be imposed or increased to penalize defendants. You should not award compensatory damages for speculative injuries, but only for those injuries which the plaintiff has actually suffered or that the plaintiff is reasonably likely to suffer in the future.

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Copmputing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require thatthe plaintiff prove the amount of his losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

You must use sound discretion in fixing an award of damages, drawing reasonable inferences where you find them appropriate from the facts and circumstances in evidence.

QUESTION NO. 1

Did the County of Lubbock establish a custom or policy which was a proximate cause of a deprivation of Plaintiff's liberty?

Answer "Yes" or "No."

Answer: **Yes**

If you have answere"Yes" to Question No. 1, then answer the following question. Otherwise do not answer the following question.

QUESTION NO. 2

What sum of money, if paid now in cash, would fairly and

resonably compensate Pliantiff for his injuries, if any, that resulted from the occurrence in question?

Considerthe elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages you find.

Answer in dollars and cents for damages, if any, as to each of the following elements:

A. Mental anguish in the past

Answer: $10,000

B. Mental anguish reasonable probable to be sustained in the future

Answer: 0

"Mental anguish" means the emotional pain, torment, and suffering experienced by plaintiff because of the deprivation of his constitutional right to his liberty.

Certificate

We, the jury, have answered the above and foregoing quetions as herein indicated, and herewith return same into court as our verdict.

_____

/s/ Presiding Officer of the Jury